Supreme Court, U.S.
FILED
JUN 28 2002
CLERK

No. 01-1730

In the Supreme Court of the United States

FRANK SINATRA, JR.,

Petitioner,

v.

BARRY KEENAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the judgment of the California Supreme Court holding that California *Civil Code* section 2225(b)(1), which provides for the confiscation of all proceeds owing to a convicted felon if the depiction, portrayal, or re-enactment of the felony for which the criminal was convicted is included in a book, motion picture or other expressive material, is facially invalid under the Liberty of Speech clause of the California Constitution (Art. I, §2, subd. (a)) constitutes a bona fide separate, adequate and independent state ground precluding this Court's jurisdiction to review that decision

Whether the California Supreme Court correctly held that California *Civil Code* section 2225(b)(1) is overinclusive and thus facially invalid under the First Amendment, consistent with this Court's decision in *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105 (1991).

STATE CONSTITUTIONAL PROVISION

In setting forth the pertinent constitutional provisions and statutes, Petitioner neglected to include Article 1, §2, subd. (a) of the California Constitution, which reads in full as follows:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

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BRIEF FOR RESPONDENT IN OPPOSITION TO *PETITION FOR WRIT OF CERTIORARI*

Respondent Barry Keenan respectfully requests that the petition for certiorari be denied.

STATEMENT OF THE CASE

The California Supreme Court's unanimous opinion accurately sets forth the pertinent facts in this case. Pet. App. 6-11. Briefly stated, in July 1998 Petitioner Frank Sinatra, Jr. sued Barry Keenan under California's so-called "Son of Sam" statute, *Civil Code* section 2225. Sinatra, Jr. sought the confiscation of all proceeds due to Keenan from Columbia Pictures' production of a motion picture based on a biographical profile of Keenan which had appeared in the January, 1998 issue of *New Times* newspaper. Sinatra, Jr. alleged that under the law he was entitled to those proceeds as a result of Keenan's conviction for kidnapping Sinatra, Jr. in 1963.

On February 21, 2002, the California Supreme Court unanimously held in *Keenan v. Superior Court*, 27 Cal.4th 413, 40 P.3d 718, 117 Cal.Rptr.2d 1 (2002) that section 2225(b)(1), on which Sinatra, Jr. based his complaint, was unconstitutional under both the First Amendment to the U.S. Constitution and the Liberty of Speech Clause of the California Constitution.

Given that the decision was based on bona fide separate, adequate and independent state grounds and that the decision is entirely faithful to, and consistent with, this Court's decision in *Simon & Schuster*, we believe that the California Supreme Court decision should not be disturbed

and that the petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

A. This Court Is Without Jurisdiction Because The Judgment Of The California Supreme Court Rests On Bona Fide Separate, Adequate And Independent State Grounds

In *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), this Court articulated the "plain statement" rule to decide whether the judgment of a state court rests upon an adequate and independent state ground. Having long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment," *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935), this Court in *Michigan* established the following rule: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." 463 U.S. at 1041.

In the present case, the decision of the California Supreme Court squarely comes within the "plain statement" rule. Indeed, at two separate points in its decision, the California Supreme Court clearly and expressly indicated that its ruling was alternatively based on the Liberty of Speech Clause of the California Constitution, Art. I, §2, subd.(a).

First, at the very beginning of the Opinion, the California Supreme Court announced its decision in the following terms:

> We conclude that these provisions of the California statute are facially invalid under both the free speech clause of the First Amendment to the federal Constitution as applied to the states through the Fourteenth Amendment, and the liberty of speech clause of the California Constitution (Art. I, § 2, subd. (a)).

The California Supreme Court set forth in footnotes the text of the First Amendment and the Liberty of Speech Clause. 27 Cal.4th at 415-416, n.1 and 2.[1]

Second, at the conclusion of its Opinion, the California Supreme Court again clearly and expressly stated that it was also reaching its decision on the separate and independent basis of the California Constitution, in the following terms:

> We reach a similar result under the liberty of speech clause of the California Constitution (Art. I, §2, subd. (a)). The California provision provides similar, and sometimes greater, protection of speech than the First Amendment (e.g., *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal.4th 352, 366-367 & fn. 12, 993 P.2d 334),* and neither party suggests any reason why it should provide lesser protection under

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[1] If a state court "decides that a particular state action violates *both* federal and state law, the final state court judgment is not reviewable by the Supreme Court [and a] decision by the Supreme Court on the federal issue would be merely advisory." Justice O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L.Rev. 1, 5-6 (1984).

the circumstances of this case. 27 Cal.4th at 436.

Consequently, in two "plain statements" the California Supreme Court clearly and expressly indicated that as an alternative basis for its ruling under the First Amendment, it was separately basing its decision on the Liberty of Speech Clause of the California Constitution, Art. I, §2, subd.(a).

Given the "plain statements" in the California Supreme Court's decision and in adherence to the principle of avoiding advisory opinions and respecting the independence of state courts, this Court is without jurisdiction and the petition should be denied on that ground.

B. Sinatra, Jr. Has Failed To Articulate A Compelling Reason To Justify Discretionary Review By This Court Since The Decision Of The Court Below Was Correctly Decided In Accordance With This Court's Decision In *Simon & Schuster*.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Despite Sinatra, Jr.'s rhetoric and misleading characterization of the decision of the California Supreme Court, which faithfully adhered to the principles articulated by this Court in *Simon & Schuster*, Sinatra, Jr. has not presented any compelling reason to this Court to exercise its discretionary jurisdiction over his appeal from the decision of the California Supreme Court.

The California Supreme Court correctly observed that the "flaw most clearly identified by the *Simon & Schuster* majority was that the New York statute was overinclusive. [I]t confiscated all profits from expressive works in which one made even *incidental or tangential* mention of his or her past crimes for non-exploitative purposes. (*Simon & Schuster, supra*, 502 U.S. 105, 121.)" 27 Cal.4th at 417.

According to the California Supreme Court, "California's analogous provision, section 2225(b)(1), similarly imposes a content-based financial penalty on protected speech. Yet section 2225(b)(1), like its New York counterpart, fails to satisfy strict scrutiny because it, too, is overinclusive. Section 2225(b)(1) contains the fundamental defect identified in *Simon & Schuster*; it reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the criminal's speech or expression on any theme or subject, if the story of the crime is included." *Id.*

The California Supreme Court reasoned, in keeping with the analysis in *Simon & Schuster,* that although section 2225(b)(1), unlike the New York law, applies only to persons actually convicted of felonies, and creates an exemption for mere "passing mention of the felony, as in a footnote or bibliography" (*id.*, subd. (a)(7)), these differences do not cure the statute's constitutional flaws. "By any reasonable construction, the California statute is still calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies." *Id.*

Recognizing that under the federal Constitution, the analysis of *Simon & Schuster* governs this case, the California Supreme Court cogently compared the California statute to the

New York statute. "Both the New York and California laws impose content-based financial penalties on protected speech. Thus they must, at a minimum, satisfy strict constitutional scrutiny. Both laws seek to serve compelling interests in preventing criminals from exploiting their crimes for profit, and in compensating crime victims from the profits of crime. Yet both laws are *overinclusive* for those purposes, because they confiscate all income from all expressive materials, whatever their general themes or subjects, that include significant discussions of their creators' past crimes." 27 Cal.4th at 423.

The California Supreme Court correctly reasoned that "[a]s did the New York statute, section 2225(b)(1) penalizes the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, section 2225(b)(1) does not confine itself to such income. Instead, it confiscates *all* a convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere passing mention. By this financial disincentive, section 2225(b)(1), like its New York counterpart, discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds." 27 Cal.4th at 431.[2]

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[2] Despite the fact that as noted above the California Supreme Court carefully analyzed the defects in the California law analogous to those found to exist in the New York law, in his petition, Sinatra, Jr. mischaracterizes the decision below, by falsely asserting that the "California court expressly acknowledges that the California law lacks the New York law's pitfalls" Pet. 6 and that the California Supreme Court "admitted" that the defects in the

Indeed, if anything, the California statute posed an even greater risk to freedom of expression than did the New York law. The California Supreme Court pointed out that in at least one respect, the involuntary trust provision of section 2225(b)(1) "operates more harshly against expressive materials that depict the creator's past crimes than did the escrow account provided for by the New York law at issue in *Simon & Schuster*. Under the New York statute, proceeds from a crime story contract were to be turned over to the New York Board for placement in escrow, but if, at the end of five years, no valid claims of the criminal's victims or creditors were pending, remaining funds in the account were returned to the criminal. (*Simon & Schuster*, *supra*, 502 U.S. 105, 109; see N.Y. Exec. Law, §632-a(4).) Under section 2225(b)(1), by contrast, any entrusted amounts not subject to legitimate individual claims at the end of the five-year trust period are turned over to the Controller for allocation to the Restitution Fund." 27 Cal.4th at 432.

Here, as below, Sinatra, Jr. argues that section 2225(b)(1) cures the overinclusiveness problem identified in *Simon & Schuster*, because it applies only to expressive materials that include the "story" of a felony for which one was convicted, and exempts mere "passing mention of the felony, as in a footnote or bibliography." (*Id.*, subd. (a)(7).) These restrictions, he claims, negate *Simon & Schuster*'s concern, that under the New York statute all profits from an expressive work would be confiscated even though the work mentioned a past offense only "tangentially or incidentally."

New York law "were not present in the California statute." Pet. 9. Despite Sinatra, Jr.'s general reference to pages 432-434 of the decision below to support these groundless claims, no such acknowledgment or admission will be found there.

The California Supreme Court bluntly responded: "We are not persuaded." 27 Cal.4th at 433.

The California Supreme Court explained that it did not read *Simon & Schuster* as suggesting that a statute which exhibited marginal narrowing in these particular regards would necessarily pass constitutional muster. "Instead, the court's concern was with the essential values of the First Amendment. As the court's lengthy discussion discloses, the vice of the New York law was that in order to serve a relatively narrow interest - compensating crime victims from the fruits of crime - the statute targeted, segregated, and confiscated *all* income from, and thus unduly discouraged, a wide range of expressive works containing protected speech on themes and subjects of legitimate interest, simply because material of a certain content - reference to one's past crimes - was included." 27 Cal.4th at 433.

The California Supreme Court correctly observed that *Simon & Schuster* made it clear that one motivated in part by compensation might discuss his or her past crimes, including those that led to felony convictions, in many contexts not directly connected to exploitation of the crime. "One might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; describe the conditions of prison life; or provide an inside look at the criminal underworld." 27 Cal.4th at 433.

Mention of one's past felonies in these contexts may have little or nothing to do with exploiting one's crime for profit, nor with the state's interest in compensating crime victims from the fruits of crime. Yet section 2225(b)(1) entrusts and permanently confiscates all income, whenever

received, from all expressive materials, whatever their subject, theme, or commercial appeal, that include a substantial description of such offenses, whatever their nature and however long in the past they were committed. Thus, even as so limited to felony convictions, section 2225(b)(1) is not narrowly tailored to achieve the compelling interests it purports to serve. *Id.*

Given this analysis, the California Supreme Court correctly rejected Sinatra, Jr.'s argument that the California statute avoids this defect because it applies only to expressive materials containing the "story" of the felony and because it expressly exempts mere "passing mention of the felony, as in a footnote or bibliography" on the theory that the law applies only when an expressive work provides what Sinatra, Jr. calls "narrative detail" about a felony for which the work's author or creator was convicted, and does not discourage mere "acknowledgment" of a prior felony conviction in the context of another subject. 27 Cal.4th at 434.

"These arguments do not convince us that section 2225(b)(1) focuses with sufficient precision on the fruits of crime, while leaving other speech-related income undisturbed. *Simon & Schuster* illustrated the overbreadth of the New York statute by observing that it reached even incidental and tangential mention of past crimes, but nothing in *Simon & Schuster* suggests the New York law could have cured its overinclusive effect simply by providing an exemption for tangential or incidental references. Moreover, *Simon & Schuster* neither stated nor implied that the federal Constitution might allow confiscation, on behalf of crime victims, of all proceeds from any expressive work that includes a descriptive account, or even a vivid account, of a past crime committed by the author." 27 Cal.4th at 434.

The California Supreme Court aptly pointed out that a statute that confiscates all profits from works which make more than a passing, non-descriptive reference to the creator's past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in non-exploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*. 27 Cal.4th at 435.

According to the California Supreme Court, "the statutory definition of story includes any *substantial* account of the facts and circumstances of a past felony which led to conviction, and the passing mention exemption would not provide safe harbor to materials containing such a substantial account. But there are multiple contexts in which expressive materials, with diverse subjects and themes unrelated to the exploitation of one's crimes, might include substantial accounts of those episodes." *Id.*

Sinatra, Jr. invites this Court to radically depart from its analysis in *Simon & Schuster* and create a brand new rule that would sweep within the purview of any "Son of Sam" law any book, motion picture or other expressive material in which the felon had "augmented his depiction of his crimes with additional text." Pet. 12. Of course, Sinatra, Jr. gives no hint of how legislatures, courts or interested individuals would ever determine what proportion of "additional text" compared to the space devoted to the "depiction" of the crime would cause a particular work to fall within or without of a particular statute. More importantly, since Sinatra, Jr.'s suggestion would still encompass works containing only an incidental or tangential mention of the past crime, it squarely runs afoul of this Court's holding in *Simon & Schuster*, at 502 U.S. at 121.

The California Supreme Court pointed out that section 2225(b)(1) would have applied to numerous works by authors whose discussions of larger subjects make substantial, and often vividly descriptive, contextual reference to prior felonies of which they were convicted had the statute been in effect at the time and place of these publications.[3] A statute which operates in this fashion disturbs or discourages protected speech to a degree substantially beyond that necessary to serve the state's compelling interest in compensating crime victims from the fruits of crime. Accordingly, the Court below concluded, in conformity with *Simon & Schuster*, that section 2225(b)(1) is facially invalid under the First Amendment to the United States Constitution.

Sinatra, Jr. improperly accuses the California Supreme Court of "countermand[ing]" this Court's directive in *Simon & Schuster* that its holding is not intended to invalidate all such victims' rights statutes and he imagines that the decision below "will compel that same result in the other forty (40)

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[3] These include, for example, Alex Haley and Malcolm X's *The Autobiography of Malcolm X* (Ballantine Books ed. 1992), in which the murdered civil rights leader describes early burglaries for which he was convicted (*id.*, pp. 161-172); Eldridge Cleaver's *Soul on Ice* (1968), which discusses his rapes of White women, for which he was incarcerated, as since-repented acts of racial rage (*id.*, pp. 14-15); memoirs by Charles Colson (*Born Again* (1976)), G. Gordon Liddy (*Will!* (1980)), and John Dean (*Blind Ambition: The White House Years* (1976)) detailing their criminal roles in the Watergate coverup; and the memoirs of Patricia Hearst, the scion of a publishing dynasty, who was kidnapped by the Symbionese Liberation Army and later participated with her captors in an armed bank robbery for which she was imprisoned (Hearst & Moscow, *Every Secret Thing* (1981)).

states with similar victims' rights statutes." Pet. 5. Sinatra, Jr. goes so far as to claim that the decision below "makes it impossible for any state legislature to tailor a remedy" in this area. Pet. 5.

Contrary to these spurious and exaggerated claims, the California Supreme Court itself stressed "the narrow nature" of its holding under both the federal and California Constitutions.

"We conclude only that section 2225(b)(1) is an overinclusive infringement of protected speech because it targets and confiscates *all* a convicted felon's proceeds from expressive materials that include any *substantial account* of the felony, in whatever context. We express no views on whether a statute targeting the income gained from expressive works that include accounts of the author's crimes could be drafted narrowly and precisely enough to overcome this problem of constitutional overbreadth. Moreover, nothing we say here precludes a crime victim, as a judgment creditor, from reaching a convicted felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments. (See generally Code Civ. Proc., § § 481.010 et seq., 680.010 et seq.) Nor do we intend, by our analysis in this case, to preclude further legislative steps, not directly related to the content of speech, to ensure that a convicted felon's income and assets, including those derived from storytelling about the crimes, are and remain available to compensate persons injured or damaged by the felon's crimes." 27 Cal.4th at 436.

The California Supreme Court's decision striking down section 2225(b)(1) is not only consistent with *Simon & Schuster*, but with the decisions in other states. One

jurisdiction's "Son of Sam" law has been invalidated since *Simon & Schuster*. *Bouchard v. Price* (R.I. 1997) 694 A.2d 670, 675-678. The laws in two other states have been challenged, but the appeals in those matters were decided on grounds other than the constitutionality of the statutes at issue. See *Rolling v. State ex rel. Butterworth* (Fla.Dist.Ct.App. 1994) 630 So. 2d 635; *Curran v. Price* (Md.Ct.Spec.App. 1994) 334 Md. 149, 638 A.2d 93. Cited at 27 Cal.4th at 427.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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